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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 521

IN THE MATTER OF THE APPLICATION

of

WILFRED DANIEL MURTHA,

Petitioner-Appellant,

against

GEORGE P. MONAGHAN, Commissioner of the Harness Racing Commission of the State of New York,

Respondent-Respondent,

for an order annulling a determination of said respondent denying petitioner's application for a license as a mutuel clerk and for a further order directing said Commission to forthwith issue such license, pursuant to Article 78, C.P.A.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the respondent-respondent, George P. Monaghan, the Commissioner of the Harness Racing Commission of the State of New York, by his counsel of record, and opposes the petition herein and asks that the same be denied.

Statement of the Case

Petitioner, Wilfred Daniel Murtha, seeks a writ of certiorari to the Court of Appeals of the State of New York "to review an order of that court, made July 3, 1957", which denied petitioner's motion for reargument and granted his motion to amend that Court's remittitur, dated January 10, 1957, to add thereto a statement that, in passing upon petitioner's appeal, the Court of Appeals had held that his rights under the Fourteenth Amendment had not been violated or denied (Appendix to Petition, p. 31).

The Court of Appeals, by its prior order of January 10, 1957, had affirmed an order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

The Appellate Division order entered February 24, 1956, had unanimously reversed an order of the Special Term of the Supreme Court, New York County, annulling a determination of the Harness Racing Commission which had denied Murtha's application for a license as a mutuel clerk and had dismissed the application (Appendix, p. 32).

Jurisdiction

The jurisdiction of this Court is invoked by the petitioner (Br., pp. 2-3) under Title 28, United States Code, § 1257, subdivision 3.

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment of the United States Constitution is the constitutional provision which petitioner claims has been violated. The New York statutory provisions which are involved are contained in Section 63 of the New York Pari-Mutuel Revenue Law (See Appendix, pp. 65-70).

The Question Presented

The very limited question presented by this petition is whether the Pari-Mutuel Revenue Law of the State of New York, in imposing limitations upon the employment at race tracks and the licensing by the State Racing Commission and Harness Racing Commission, of State employees and the employees of State subdivisions, has violated the rights of these public employees under the Fourteenth Amendment.

The Proceeding

The Decision of Special Term

In a proceeding under Article 78 of the New York Civil Practice Act, petitioner, a public employee, sought to compel the State Harness Racing Commissioner to grant him a license to work as a mutual clerk at a harness racing track.

The Commissioner, in the exercise of the powers granted to him by Section 41-a of the Pari-Mutuel Revenue Law (Unconsol. Laws, § 7599-a, 1957 Cumulative Annual Pocket Part, pp. 91-92) had refused to issue such a license to the petitioner, a person admittedly earning $6700 per annum as a county employee, upon that ground that it would violate Section 63 of the Pari-Mutuel Revenue Law (Unconsol. Laws, § 7615, 1957 Cumulative Annual Pocket Part, pp. 101-102), which at that time contained a prohibition against the employment at race tracks of public employees, unless the public employee's compensation was less than $5000 per annum (Appendix, p. 69).

Special Term interpreted the New York statute, § 63 of the Pari-Mutuel Revenue Law (as added by Chapter 514 of the Laws of 1954, and amended by Chapter 515 of the same Laws and Chapter 815 of the Laws of 1955) as not prohibiting the issuance of a license to the petitioner; and it directed that the license be issued (App., pp. 51-59).

As construed by Special Term (App., pp. 54-58), the bar against the issuance of any license to a public employee, imposed by subdivision 1 (a) of section 63 of the Pari-Mutuel Revenue Law (App., p. 65) was *completely* removed by the enactment of the 1955 statute (App., p. 70), even though, by its terms, in subdivision 7 which was added to section 63 of the Pari-Mutuel Revenue Law by the 1955 amendment, the removal of the licensing bar contained in subdivision 1 (a) was restricted to public employees who had been "qualified to hold such a license on or prior to April sixth, nineteen hundred fifty-four" (App., p. 79). Special Term did not deem it necessary to pass upon any constitutional question (App., p. 58).

The Appellate Division Decision

The Appellate Division construed the provisions of Section 63 of the Pari-Mutuel Revenue Law quite differently from Special Term (App., pp. 34-50). It demonstrated, by a careful analysis of the terms of the statute and a thorough review of the history of the New York legislation dealing with both harness racing and flat racing, that Special Term had misconceived the Legislature's purpose in enacting Chapters 514 and 515 of the Laws of 1954 and Chapter 815 of the Laws of 1955 (App., pp. 35-49).

As construed by the Appellate Division, the first subdivision of Section 63, as enacted by Chapter 514 of the Laws of 1954, enacted several prohibitions as to public employees. Paragraph (a) was construed to set up a *complete* prohibition against their licensing; paragraph (b) was construed to prevent them holding any proprietary interest in certain firms, or associations conducting track activities; and paragraph (c) was construed to prevent them from holding any office or employment with such firm, association or corporation (App., pp. 42-43).

The Appellate Division construed subdivision 6 of Section 63 (enacted by Chapter 515 of the Laws of 1954) to

relax the "employment" prohibition of paragraph (c) only as to a public employee of a political *subdivision* (with certain stated exceptions) whose compensation was less than $5000 per annum, if the local legislative body of the political subdivision authorized such employment (App., pp. 42-43).

It found the legislative purpose, in imposing employment restrictions as well as licensing prohibitions, to be to cover by paragraph (c) track jobs for which no license was required (App., pp. 43-44). Conversely, it was pointed out that the licensing prohibitions of paragraph (a) extended to persons other than "employees" of a track (App., p. 44). In other words, the Appellate Division found the restrictions against "licensing" and "employment" were intended to supplement each other.

The Appellate Division flatly rejected Special Term's construction of subdivision 7 of Section 63 (App., p. 45). It did not view that subdivision, enacted by Chapter 815 of the Laws of 1955, as lifting *entirely* the restrictions imposed by Section 63 upon a public employee. The Appellate Division illustrated the *limited* situations as to which the Legislature intended to remove the restriction on "licensing" (App., pp. 45-48). Finally, the Appellate Division pointed out that petitioner's "employment" at a track was barred by the prohibition of paragraph (c) of subdivision one of Section 63. And it observed that he lacked the standing to question the constitutionality of Chapter 515 of the Laws of 1954, for if, as he contended it were unconstitutional "because it is unreasonable or fails to grant equal protection", Chapter 514 of the Laws of 1954 would still remain, containing the provisions of law precluding petitioner from obtaining a license.

The Court of Appeals Decision

Upon petitioner's appeal to the New York Court of Appeals, that Court unanimously affirmed the unanimous determination of the Appellate Division, without opinion.

(2 N. Y. 2d 819). Upon petitioner's motion to amend its remittitur, it indicated that it had held that petitioner's rights under the Fourteenth Amendment had not been violated or denied (App., p. 31).

ARGUMENT

The petitioner, a public employee, was not deprived of any constitutional rights, in violation of the Fourteenth Amendment, by the provisions of Section 63 of the New York Pari-Mutuel Revenue, which prohibited the licensing of public employees by the State Racing Commission or the State Harness Racing Commission, except where the employee had been theretofore qualified to receive such a license; and which prohibited the employment at race tracks of all public employees, with very limited exceptions. The petitioner is not constitutionally aggrieved, by reason of the fact that the exceptions to the prohibition were drawn so narrowly as to leave the petitioner within the scope of the prohibition.

(1)

The petitioner has no constitutional right to work for the State of New York or any of its local subdivisions upon his own terms. *Adler* v. *Board of Education*, 342 U. S. 485, 492. New York clearly has the power to prescribe reasonable terms under which its employees or those of its local subdivisions may work for it. See *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100, as to a similar restriction prohibiting federal employees from "taking any active part in political management or in political campaigns." And see *Thompson* v. *Wallin*, 301 N. Y. 476, 489-490, app. dism. 342 U. S. 801.

Section 63 of the Pari-Mutuel Revenue Law bears a reasonable relation to the New York Legislature's purpose to safeguard the concept that public office and public service is in every respect a public trust; and to disasso-

ciate public employment and public office from racing interests. See *Communications Assn.* v. *Douds*, 339 U. S. 382, 405; *Bryant* v. *Zimmerman*, 278 U. S. 62, 72-73, 77; *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Hawker* v. *New York*, 170 U. S. 189, 192-197. See also *Linehan* v. *Waterfront Commission*, 116 F. Supp. 683, aff'd 347 U. S. 439 and *Staten Island Loaders* v. *Waterfront Commission*, 117 F. Supp. 308, aff'd 347 U. S. 439.

(2)

The exceptions engrafted in 1954 and 1955 upon the blanket prohibitions against the licensing of public employees by the Harness Racing Commissioner and the employment by racing associations of public employees did not render the prohibitions against such licensing and employment constitutionally invalid.

The exception as to *licensing* was created by subdivision 7 of section 63 (L. 1955, ch. 813), only in favor of persons who, prior to a certain date, would have been "qualified to hold such a license". The limited group in whose favor this exception could operate has been described in the Appellate Division opinion (App., pp. 45-48). In large measure, the exception, as construed by the Appellate Division, permitted licenses for track activities which did not fall into the category of "employment" by a racing association. Since New York's classification, so construed, rests on real distinctions as to the nature of the track activity for which a public employee may be licensed, there would appear to be no reason for this Court to assume jurisdiction herein. The power of a State to classify upon any reasonable basis has unquestionably been recognized by this Court. *Borden's Co.* v. *Baldwin*, 293 U. S. 194; *Walters* v. *City of St. Louis*, 347 U. S. 231, 237.

In the "employment" exception which was enacted, to add subdivision 6 to section 63 of the Pari-Mutuel Revenue Law (L. 1954, ch. 515), the New York Legislature adopted

a classification, whose reasonableness would seem not to be subject to constitutional attack. Under its terms, the absolute prohibition against the employment of all employees of the State itself, remained unchanged. The Legislature merely delegated to local legislative bodies of the political subdivisions of the State a very limited measure of "home rule". To these local legislative bodies, which presumably had a more intimate knowledge than the State Legislature of the interests, activities and possible dangers of the political tie-ups of their employees, it entrusted the discretionary power to permit only their lowest paid employees, if they were not engaged in certain law-enforcement activities, to obtain race-track employment. We do not believe that this Court will be interested in passing upon the wisdom of this very limited experiment in "home rule". *Adams* v. *Milwaukee*, 228 U. S. 572, 583; *Communications Assn.* v. *Douds*, *supra*, pp. 400-401; *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489, 491.

The petition for certiorari should be denied.

Dated: New York, N. Y., October 14, 1957.

Respectfully submitted,

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